FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 31 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 288

SID W. RICHARDSON, ET AL

Petitioners,

VS.

KEITH KELLY, RECEIVER,

Respondent.

MOTION FOR REHEARING FOR PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

John M. Scott, Attorney at Law,
1605 Fair Building,
Fort Worth, Texas.
Attorney for Petitioners.

Reimers-Taylor Company—Fort Worth, Texas—Phone 3-1521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 288

SID W. RICHARDSON, ET AL

Petitioners,

VS.

KEITH KELLY, RECEIVER,

Respondent.

MOTION FOR REHEARING FOR PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Now come Petitioners Sid W. Richardson, et al, and present their motion for rehearing to review the action of this Court in refusing their petition for writ of certiorari to the Supreme Court of Texas on January 7, 1947. The refusal of the petition was necessarily

predicated on the determination by the Court that *Christopher vs. Brusselback*, 302 U. S. 500, a case believed by Petitioners to be squarely controlling on similar facts, was erroneous or was distinguishable.[1]

The petition presented a basic constitutional question under the due process clause turning upon *Pennoyer vs. Neff* and *Christopher vs. Brusselback*. The case involves a question of great public importance in the administration of insolvent insurance companies, banks, and other corporations where the contention is made that the stockholders or members have a proprietorship obligation beyond their original investment. Petitioners submit that whether this Court considers *Christopher vs. Brusselback* erroneous, or whether it considers the instant case distinguishable, the importance of the due process question requires that this Court render its considered judgment on the merits. *Christopher vs. Brusselback* was the unanimous judgment of the Court, pronounced by Chief Justice Stone. Apparently, it controls the case at bar, so plainly, that the schoolboy author in *25 Texas Law Review 64*, so concluded. Chief Justice Alexander of the Supreme Court of Texas likewise so held. If *Christopher vs. Brusselback* does not control the case at bar, for whatever reason, the Court should so pronounce only by its written opinion in order that the basic right to a day in court guaranteed by the due process clause may be preserved. To portray the validity of this premise, an examination of the

[1]Respondent's suggestion that the decision below turns upon an adequate non-federal ground is completely answered in Petitioners' Reply Brief, Pages 5-7.

perspective of the litigation and its impact upon the due process clause are respectfully presented in this motion for rehearing. Our conviction is that the refusal of the petition is inconsistent with the written principles governing the jurisdiction and discretion of this Court.

In such a perspective, which we shall offer presently, it is plain that the case is a novelty in constitutional law affecting of itself the rights of more than 3,000 policyholders similarly situated to Petitioners, destroying by indirection the basic right to a day in court of many thousands of individuals not now directly involved, and upsetting without explanation the settled law of this Court pronounced in *Christopher vs. Brusselback*. Whatever Justice Stone said in that opinion will now be disregarded in the day-to-day handling of similar affairs, and not until this Court can be prevailed upon to again examine *Christopher vs. Brusselback*, will the ordinary citizen enjoy the benefit of the reasoned principles of due process laid down by an unanimous Court in that case.

The significance of the action of the Court upon the very ruling sought to be reviewed by the petition, the holding of the Supreme Court of Texas, is likewise startling. The Court below on May 2, 1945, handed down an unanimous opinion squarely holding that the judgment rendered in Cause No. 63621 was void. This Court will take judicial notice of the fact that following that opinion, and pursuant to a constitutional amendment adopted by the State of Texas, the Supreme Court of Texas was augmented by the

Commissioners of Appeal and became a nine-judge Court between May 2, 1945, and December 29, 1945, the date on which the judgment of the Court below now sought to be reviewed was rendered. As reflected by the Record, Page 801, the nine-judge Court withdrew the unanimous opinion which the Supreme Court of Texas had rendered on May 2, 1945, and substituted the opinion of December 29, 1945, to which the petition was directed. To this opinion Chief Justice James P. Alexander dissented in vigorous and almost scathing terms. The dissent is grounded in two principles. First, the Chief Justice of the Supreme Court of Texas held that the due process clause of the United States Constitution and the decisions of this Court thereunder squarely conflicted with the determination of the majority. In an extensive and carefully reasoned opinion the dissenting Chief Justice discussed the five due process pronouncements of this Court in point on the issue which preceded *Christopher vs. Brusselback*. He patterned the facts and principles in those cases into a logical and unanswerable setting for his examination of *Christopher vs. Brusselback*. He proceeded to take that decision and demonstrate more clearly than is within our power that the basic constitutional rights of the policyholders of the instant company to a day in court and the opportunity to present their defense had been negated by the majority of the Court below in evading *Christopher vs. Brusselback*.

The second principle in the dissenting opinion was that the very officer of the Court in the class suit had conducted the class suit without complying with

the requirements of good faith. While the dissenting Judge did not use the term "fraud," the facts set forth by him speak for themselves and fraud is redolent in the very warp and woof of the class suit.

Chief Justice Stone again speaking for an unanimous Court touched upon the requirement of good faith in a class suit in *Hansberry vs. Lee*, 311 U. S. 32. While that opinion within prescribed limitations recognized the validity of the class suit device (none of such limitations being applicable to the case at bar), it likewise renders mandatory the requirement of utmost good faith in the conduct of the class suit by those actually in Court. This Court has not yet defined the term "utmost fairness and good faith." By its refusal of the petition, however, on the facts reflected by the opinion of the Court below, this Court has inadvertently opened the dor to fraud in cases where a class suit would otherwise be proper. All that we have said and will say about the destruction of *Christopher vs. Brusselback* could likewise be reiterated with respect to *Hansberry vs. Lee.*

In such a background the petition for certiorari was filed. It reached this Court for submission on November 20, 1946. The printed record consisted of 863 pages reflecting more than six years of litigation, involving a judgment of $401,361.05 and interest thereon for six years, a judgment against more than 3,000 unnamed, uncited, unheard and undefended citizens. Following submission on November 20, 1946, an inaccurate reply brief was filed by Respondent on the 19th day of December, 1946. This reply brief

consisted in a large part of hastily drawn conclusions and inaccuracies of fact which if considered alone would impel this Court to refuse the petition. It necessitated a careful and accurate reply so that this Court in the press of its duties might not be led astray in the maze of the voluminous record. Petitioners prepared such a reply replete with exact references to the record. The effect of the reply brief of Petitioners was to completely refute and expose the legal and factual inaccuracies of the brief in opposition to the granting of the petition. Conscious that the detailing of the record required by our reply brief may have obscured the vital principle of constitutional law involved, we ask the Court to review the salient principal of law which is as definite and exact on these facts as the Pythagorean theorem is to the right triangle.

That principle succinctly stated is this:

The personal judgment rendered by the State Court against Petitioners and 3,000 other defendants without actual service of process is void. *Pennoyer vs. Neff*, 95 U. S. 715. The class suit device cannot be substituted for actual service of process in the instant case unless the applicable statute or an executed contract by the defendants sought to be bound expressly provided for the assessment device, so that it may be said that the defendants consciously and deliberately substituted the assessment device for their inherent constitutional right to have their personal liability judicially determined. *Christopher vs. Brussleback*, 302 U. S. 500; *Pink vs. AAA Highway Ex-*

press Co. 314 U. S. 201. The record affirmatively shows in the instant case that there was no statutory or contractual authorization for the assessment. It, therefore, follows that the judgment rendered without service of process against Petitioners and 3,000 other uncited defendants was void, as held by the dissenting Chief Justice of the Supreme Court of Texas.

To this Respondent suggested tenuous and unsubstantial distinctions between the instant case and *Christopher vs. Brusselback.* Those distinctions are analyzed separately, and separately destroyed, in the reply brief of Petitioners filed in this Court December 27, 1946, Pages 12 to 16. The second ground of resistance to the petition was that the Court below decided the case on a non-federal question to the effect that Petitioners had no meritorious defense. That ground of opposition is made in disregard of the express language of the Supreme Court of Texas,[2] and in contravention of the printed record protraying six years of litigation wherein Petitioners have struggled to present their meritorious defense to some Court, somewhere, sometime. That the meritorious defense exists and is valid is plainly evident from the fact that the Courts of Texas have so held in a similar case. See the discussion in Petitioners' reply brief, Page 7. That Respondent's whole opposition is fallacious and inaccurate is, we believe, established by the salient and undisputed facts set forth in the dissenting opinion of the Chief Justice of the Supreme Court of Texas.

[2]"We hold that the judgment in Cause No. 63621 was neither void nor voidable, therefore it is unnecessary for us to consider other questions raised by Petitioners." (R. 816).

The refusal of the petition by this Honorable Court, while not technically a precedent destroying *Christopher vs. Brusselback*, actually has that effect in the day-to-day application of the due process clause to insolvent reciprocal companies. The impact of the decision renders the conducting of a reciprocal insurance business by a solvent company impossible. Every policyholder runs the risk of untold and undetermined future liabilities, except where statutory limitations have been created, and the purchase of the policy is an invitation to fraud by rapacious would-be receivers.

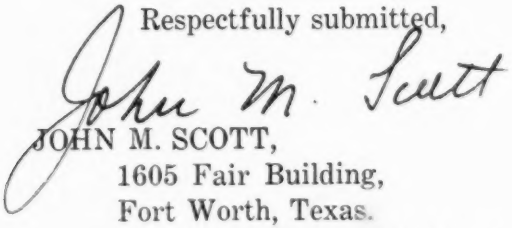
Convinced of the grave premises upon which this motion rests and solemnly conscious of the duty of counsel to make the character of statements herein contained advisedly and with candor, we respectfully submit this motion in the firm conviction that the action of the Court in refusing the petition was erroneous.

In the face of the dissenting opinion of the Chief Justice of the Supreme Court of Texas holding that *Christopher vs. Brusselback* governs the case at bar, and the evasive language of the majority of that Court in refusing to follow it, this Court should speak its declaration whether it be that *Christopher vs. Brusselback* is distinguishable, or invalid. Only upon the basis of an opinion by the Court can the due process clause and the guaranty it contains of a full and fair day in Court be cast in legal bronze. We are conscious of Cordozo's language, "Life has relations not always capable of division into inflexible com-

partments." But he was not speaking of the guaranties of due process.

It is of prime importance in our jurisprudence that those rights be exactly delineated and thus inhere in every daily transaction where they may be relevant. Constitutional rights concerning citation, notice, and the conduct of legal proceedings must not be surrounded by a penumbra of vagueness. The affairs of a troubled world demonstrate that freedom does not result from mere protestations of democracy and equal rights but rather in the translation of these abstractions to fixed and definite criteria of daily application. Only by writing upon the subject raised by this petition can the solemn responsibility of this Court to construe the Constitution be adequately discharged for the benefit of the people who live under it.

Respectfully submitted,



JOHN M. SCOTT,
1605 Fair Building,
Fort Worth, Texas.
Attorney for Petitioners.

SAM DARDEN,
Liberty Building
Waco, Texas.

MILBURN E. NUTT,
Staley Building
Wichita Falls, Texas.

SAM R. MERRILL,
Bankers Mortgage Bldg.
Houston, Texas.

WILLIAM M. BROWN,
1605 Fair Building,
Fort Worth, Texas.
Of Counsel.